

The parties do not raise as issues and therefore the findings and orders of the Special Administrative Law Judge are hereby approved and adopted by the Appeals Board that claimant met with personal injury by accident arising out of and in the course of his employment on November 8, 1990, that the medical expenses incurred with Dr. Michael

Estivo shall be considered authorized and that claimant is entitled to unauthorized medical expense up to the \$350.00 statutory maximum.

The issues remaining for determination by the Appeals Board are:

- (1) Claimant's average weekly wage;
- (2) The nature and extent of claimant's disability, if any; and
- (3) The liability of the Fund, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds as follows:

- (1) The claimant's average weekly wage is \$500.04 pursuant to K.S.A. 1990 Supp. 44-511(b)(4)(B).

The issue surrounding the determination of claimant's average weekly wage turns on the question of the treatment to be given to claimant's "on-call" work status. Claimant testified that he was on call twenty-four (24) hours a day, seven (7) days a week, usually two (2) weeks out of every month. This was in addition to his regular eight (8) hour work day, five (5) days a week. There were generally three (3) servicemen who rotated the on-call duties a week at a time, although sometimes there were as few as two (2) or as many as four (4) servicemen on the rotation. Claimant testified that when he was hired by respondent there were three servicemen who rotated the on-call night duty a week at a time. That eventually changed to the on-call duty being rotated between him and one other person and then back again to three (3) persons.

Lawrence J. Sisson, vice president of Becker Tire, testified that the majority of time claimant worked for respondent there were three (3) or four (4) people on the weekly on-call rotation. The policy was that the worker on call had a later time to report in for the start of the morning shift if they had worked calls during the night.

Rod Becker was the manager of Becker Tire during part of the time claimant worked there. Mr. Becker left his employment with the respondent approximately five (5) months prior to claimant's accident. He testified concerning the on-call rotation system. He indicated that there were at times three (3) servicemen on rotation but that eventually they got up to four (4) servicemen working the rotation on a regular basis so that each was on call only one week a month. A serviceman on call was not called out every night. He estimated the average was three (3) times a week. This would generate an extra nine (9) or ten (10) hours per week of work for the on-call person. Therefore a worker was not expected to work twenty-four (24) hours a day, seven (7) days a week when it was their turn to be on call. Although they were still expected to work their regular eight (8) hour shift after having been on call. The on-call person carried a beeper and wherever he was when he was paged he was expected to be at work within an hour. Mr. Becker does not have any knowledge of the on-call status or system after he left his employment with respondent in June of 1990. However, he recalls that after claimant's prior back injury in 1989 the claimant was allowed to work in the shop as much as possible and off of the service truck. Even so, he was still doing on-call duty but Mr. Becker believes another worker sometimes worked two (2) weeks of on-call duty back-to-back in order for claimant not to be called out.

The Special Administrative Law Judge found that the calculation of claimant's average weekly wage should include the time claimant was on call. He reasoned that any requirement that claimant hold himself "on call" for work twenty-four (24) hours per day on a rotating basis with either two (2), three (3), or four (4) other employees constituted days that the employee was expected to work as contemplated by K.S.A. 1990 Supp. 44-511(b)(4)(B). That statute provides in pertinent part:

"If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: . . . (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) *the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work*, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of an additional compensation." (Emphasis added.)

In finding claimant's on-call rotation to constitute days he was expected to work the Administrative Law Judge relied upon Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The issue in Tovar was whether the claimant's compensation should be computed on the basis of a five (5) day work week or a six (6) day work week. The Court decided that factual question based upon a determination of whether the claimant was regularly expected to work five (5) or six (6) days a week. The Court of Appeals found:

"K.S.A. 1990 Supp. 44-511(b)(4)(B)(ii) bases straight-time pay on the number of days a claimant works, not the number of hours. Because the claimant usually and regularly worked, and was expected to work, on Saturdays, the facts fit within the statutory language provided for in subsection (b)(4)(B)ii, and the claimant's average weekly wage must be calculated on a six-day work week." Tovar, *supra* at 789 and 790.

In the instant case, claimant was required to hold himself on call for work over and above his regular forty (40) hour work week. The legislative intent expressed in the Workers Compensation Act for workers who are "on call" or "on standby" to return to work and perform "overtime" work is that they be compensated for such services by the computation of their average weekly overtime as provided for in K.S.A. 1990 Supp. 44-511(b)(4)(B). Thus, claimant's gross average weekly wage is \$500.04, calculated as follows: straight-time hourly rate \$8.40 times eight (8) hours per day times five (5) days per week equals \$336.00 plus average per weekly overtime of \$164.04 for a total of \$500.04.

(2) Claimant should be compensated based upon a twenty percent (20%) permanent partial work disability.

The only physician to testify and offer an expert medical opinion concerning claimant's functional impairment and restrictions was Dr. Paul D. Lesko, a board-certified orthopedic surgeon practicing in Wichita, Kansas. He testified on two (2) occasions in this case.

Dr. Lesko's first deposition was given on October 6, 1992. He first saw claimant on February 12, 1991. At that time, claimant gave a history of having injured his back at work on November 8, 1990 while lifting a tire. His examination led Dr. Lesko to believe that claimant's low back and occasional leg pain were probably indicative of disc inflammation or irritation with some right-sided sciatic-like symptoms. A CT scan was reviewed which showed a mild bulge at L4-L5, more to the right, which was consistent with claimant's low back and right leg pain and the doctor's physical examination findings. Claimant was treated with anti-inflammatory medication, epidural injections, exercise and work hardening. He last saw claimant on April 30, 1991 at which time he believed claimant had reached maximum medical improvement. He rated claimant at five percent (5%) permanent partial impairment of function. He recommended permanent restrictions of maximum lifting of fifty to seventy-five (50-75) pounds occasionally and thirty (30) pounds frequently.

A second deposition of Dr. Lesko was taken on July 20, 1993. At that time Dr. Lesko was asked to take into consideration the results of the functional capacity examination and testing which was done February 23, 1993. Dr. Lesko was asked whether claimant could perform certain types of strenuous manual labor. He replied that although the CT scan shows a bulging disc, the FCE showed that claimant is functioning within the very high demand level so he could probably do that work. He admitted, however, that a FCE had also been done on April 4, 1991 prior to his first deposition which also showed claimant functioning in the very heavy category but, at that time, Dr. Lesko, nevertheless, imposed restrictions against such work. Dr. Lesko now believes claimant should be able to lift one hundred (100) pounds frequently and constantly over fifty (50) pounds. He does question whether claimant could do it over a course of time because he does have structural problems with his back and there can be periods of flare-ups. Claimant is highly motivated and does exercises to keep his muscles strong. He is therefore probably doing better than the average person would be expected to do. Nevertheless, he would be concerned that his symptoms might worsen if he repeatedly functioned at the very heavy work level. If he were to make a recommendation for the category of work claimant should seek employment in it would be somewhere in between the medium and heavy categories; that is, occasionally lifting seventy-five (75) to one hundred (100) pounds, frequently lifting thirty-five (35) to fifty (50) pounds and constantly lifting fifteen (15) to twenty (20) pounds. He would further suggest that claimant limit forward bending and stooping to tolerance. Because the claimant is so motivated he is likely to overdo and then have a recurrence of symptoms. Claimant should be advised that if he experiences any increased back or leg pain he should reduce his activities accordingly so as not to run the risk of worsening his condition.

The deposition of claimant's vocational expert, Jerry Hardin, was taken prior to the second deposition of Dr. Lesko. Accordingly, Mr. Hardin applied Dr. Lesko's original restrictions of fifty to seventy-five (50-75) pounds maximum lift occasionally and thirty (30) pounds frequently. Based upon those restrictions, Mr. Hardin opined that claimant would

be able to function completely within the sedentary, light and medium categories of work and there would be some occupations above the medium category he would be able to do even though he could not be classified as able to perform within the heavy or very heavy categories. Based upon those restrictions, Mr. Hardin gave an opinion that claimant's ability to perform work in the open labor market has been reduced ten to twenty percent (10-20%) as a result of his work-related injury and resulting restrictions. Mr. Hardin also gave an opinion that claimant's ability to earn a comparable wage has been reduced by forty percent (40%) based upon a preinjury wage of \$8.44 per hour plus overtime for approximately \$501.00 per week preinjury and \$300.00 per week postinjury. Mr. Hardin used claimant's employment as a bouncer at The Cowboy bar making \$50.00 a night, six (6) nights a week, as his actual postinjury wage (although claimant testified to sometimes only working four (4) or five (5) nights a week). He was not aware and therefore did not take into consideration the fact that claimant was also earning \$10.00 per hour working for a private investigator during part of the time that he was also working at The Cowboy club. He admitted that if claimant were earning additional income from performing duties as a private investigator then that income would impact his evaluation and opinion concerning claimant's loss of actual wages.

The deposition of Karen Crist Terrill, whose expert vocational testimony was offered on behalf of respondent, was taken July 27, 1993. She therefore had the benefit of Dr. Lesko's revised restrictions. She testified that if she were to base her opinions upon Dr. Lesko's initial testimony early in his deposition that claimant was able to perform very heavy work, then claimant has not suffered any loss of labor market access and no loss of wage-earning ability.

Using Dr. Lesko's later testimony limiting claimant to work somewhere between the medium and heavy category, Ms. Terrill opined that if claimant is restricted to the heavy category he would have a one percent (1%) loss of labor market access for a loss of ability to perform work in the open labor market, and if he's restricted to medium then he would have suffered a twelve percent (12%) loss. Ms. Terrill further opined that claimant has no loss of wage-earning ability whether he is at the medium or heavy categories because he retains the ability to return to jobs that would pay him the same as what he was earning with the respondent. He therefore retains the ability to earn a comparable wage under either scenario.

There is a considerable amount of evidence in the record concerning claimant's actual earnings postinjury. He did not return to work for respondent, and the Appeals Board finds from the evidence in the record that he would not have been able to do so absent accommodation. This conclusion is based upon the evidence that his job duties for respondent included at times lifting weights in excess of one hundred to one hundred and fifty (100-150) pounds.

At the time of his deposition of October 8, 1992 claimant was working as a temporary for Evcon Industries running a punch press. He was paid \$6.35 an hour and working eight (8) hours a day, five (5) and six (6) days a week. He worked a six (6) day week roughly every other week. The overtime was not guaranteed. At that time his temporary employment was to last at least another three (3) months. He testified that since leaving Becker Tire he has also worked at The Cowboy club as a doorman. He worked there ten (10) months earning \$50.00 per night, usually six (6) nights per week. Since leaving Becker Tire claimant has also taken a three (3) week course in aeronautical sheet metal repair at the Wichita Vo-Tech Center. He has looked for work in the aircraft

industry where he could be expected to earn \$8.00 to \$9.00 an hour but he has not been able to obtain such employment thus far. Since his accident claimant has also worked a couple of Saturdays for a friend who is a bricklayer earning \$8.00 an hour. He also worked a couple of weeks for a private investigator doing surveillance for \$10.00 an hour. He did this while he also worked for The Cowboy club. He has also applied for work in law enforcement which he believes pays \$10.00 an hour during training and \$10.55 per hour after probation.

Claimant was deposed a second time on June 18, 1993. At that time he was employed by Sentinel Patrol as a security guard earning \$4.85 an hour. He was hired at \$4.65 an hour, was given a twenty (20) cents per hour raise and is due another raise of an additional twenty (20) cents per hour. The only other work he has done while working for Sentinel is two (2) days mixing mortar for the friend who is a bricklayer at \$8.00 per hour. Claimant testified that his prior work at Evcon paid \$6.10 an hour initially and by the time he was laid off he thinks he was making \$6.50 or \$6.75 an hour averaging forty (40) hours a week, although sometimes he worked over forty (40) hours. He is a full-time, forty (40) hour a week employee for Sentinel and also occasionally works some overtime. At the time of his deposition claimant testified that he did not receive any fringe benefits from Sentinel; although the record was subsequently supplemented to reflect that claimant became eligible for health insurance coverage at Sentinel Patrol, Inc. on June 30, 1993, that he enrolled in same on August 6, 1993 and as of that date the employer paid \$105.00 per month toward claimant's health insurance coverage. The deposition of Don Goseland, operations manager for Sentinel Patrol, was taken August 5, 1993. He testified that claimant started at \$4.65 an hour, and that he was now making \$5.00 an hour but should soon be raised to \$5.25.

Based upon the record taken as a whole, the Appeals Board finds that claimant has lost between zero and twenty percent (0-20%) of his ability to engage in work in the open labor market and has lost between zero and forty percent (0-40%) of his ability to earn a comparable wage. Whereas claimant is most likely in the lower portion of the range of labor market loss, based upon restrictions that would put claimant in the medium to heavy work categories, the evidence also suggests that claimant's wage loss is most likely at the higher end of the zero to forty percent (0-40%) range unless claimant is able to access the aircraft industry job market by making use of his training in sheet metal assembly. However, given the testimony concerning claimant's efforts to date in applying for such employment and the testimony that those industries are laying off as opposed to hiring workers, it is unlikely that he will be able to make use of those job skills in the near future and thus will not be able to access the higher end of his wage-earning ability scale. Taking the record as a whole, the Appeals Board finds that the twenty percent (20%) permanent partial general work disability award given by the Special Administrative Law Judge should be affirmed. The Appeals Board agrees with the decision of the Special Administrative Law Judge to give an approximate equal weight to the wage loss and work ability prongs of the two-part test for work disability following Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990) and Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). Although the Appeals Board finds a different average weekly wage from that found by the Special Administrative Law Judge and, accordingly, has a different take on the vocational expert testimony as to the wage-loss prong of the two-part work-disability test, we nonetheless find a twenty percent (20%) permanent partial general body work disability to be reasonable, appropriate and supported by the evidence in the record. We therefore affirm the percentage of work disability found by the Special Administrative Law Judge in his Award.

(3) The Fund should bear no liability for this award.

The Special Administrative Law Judge apportioned liability for his award one-half ($\frac{1}{2}$) against the respondent and one-half ($\frac{1}{2}$) against the Fund due to the claimant's having had a pre-existing back problem of which the respondent was aware. Dr. Lesko testified that claimant probably would not have had the aggravation in 1990 but for the claimant's 1989 injury. However, Dr. Lesko's opinion was based upon his understanding that claimant's symptoms in 1990 were the same as what claimant had experienced following his injury in 1989 and that they were to the same part of his back. Dr. Lesko admitted that he did not examine the claimant prior to his November 8, 1990 injury and that he did not review any records concerning claimant's condition prior to November of 1990. He further admitted that he did not know anything about claimant's treatment for the 1989 injury and that he did not know how much weight that claimant was lifting at the time of his 1990 accident. He agreed that lifting almost any kind of tire could be enough to cause a herniated disc even absent a pre-existing condition.

Claimant testified that the injury he had on November 8, 1990 was not the same as he had in 1989. He stated that his 1989 back pain was two-thirds ($\frac{2}{3}$) of the way down his back and went to the right side of his buttocks. The pain was higher on his back in 1989, probably four (4) to six (6) inches higher. He did not have any low back problems in 1989, did not have problems with his right leg, just pain down to his buttocks in 1989. The 1990 injury resulted in pain lower down in his back with a sharp stabbing pain going down into his leg. He described the 1990 pain as more intense and going farther down his leg as compared to the 1989 incident. In addition, the 1989 injury did not result in his being given a rating nor any permanent restrictions. The Appeals Board finds that the history and assumptions upon which Dr. Lesko relied in giving his "but for" opinion were inaccurate and thus his opinion is untrustworthy and unreliable. The Appeals Board finds that the respondent has failed to meet its burden of proving Fund liability in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 25, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, David D. Spears, and against the respondent, Becker Tire of Wichita, Inc. and its insurance carrier, United States Fire Insurance Company, for an accidental injury which occurred November 8, 1990 and based upon an average weekly wage of wage of \$500.04, for 61.14 weeks of temporary total disability compensation at the rate of \$278.00 per week in the sum of \$16,996.92, followed by 353.86 weeks at the rate of \$66.68 per week or \$23,595.38 for a 20% permanent partial general body disability, making a total award of \$40,592.30.

As of October 13, 1995, there is due and owing claimant 61.14 weeks of temporary total disability compensation at the rate of \$278.00 per week or \$16,996.92, followed by 196.00 weeks of permanent partial disability compensation at the rate of \$66.68 per week in the sum of \$13,069.28, for a total of \$30,066.20 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$10,526.10 is to be paid for 157.86 weeks at the rate of \$66.68 per week, until fully paid or further order of the Director.

Medical expenses incurred prior to the appointment of Dr. Lesko are to be paid as authorized medical expenses as well as those incurred after Dr. Lesko was appointed.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Regular Hearing	\$ 72.40
Don K. Smith & Associates Deposition of Paul D. Lesko (10-6-92)	\$306.50
Deposition of David D. Spears (10-8-92)	\$557.00
Deposition of Jerry D. Hardin	\$323.50
Kelley, York & Associates Deposition of Lawrence J. Sisson	\$209.06
Deposition of Rod Becker	\$332.39
Deposition Services Deposition of David D. Spears (6-18-93)	\$185.00
Deposition of Paul Lesko (7-20-93)	\$171.40
Deposition of Karen Crist Terrill	\$172.80
Deposition of Don Goseland	\$161.80
Deposition of James (Gene) McAdam	\$158.60

IT IS SO ORDERED.

Dated this ____ day of October 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kenneth M. Stevens, Wichita, KS
Gary A. Winfrey, Wichita, KS

Scott J. Mann, Hutchinson, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director **ENDFIELD**